MAWAR AWAL (M) SDN BHD

v.

KEPONG MANAGEMENT SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[SUIT NO: S6-22-2014-2003]
15 SEPTEMBER 2005

CONTRACT: *Specific performance - Sale and purchase agreement - Breach of terms of agreement - Failure to grant power of attorney to plaintiff - Whether a mandatory obligation - Whether sale and purchase agreement extinguished by deed of assignment and another agreement of a later date - Allegation of novation - Whether improbable - Whether just and equitable for court to grant specific performance*

CONTRACT: *Sale and purchase agreement - Specific performance, application for - Breach of terms of agreement - Failure to grant power of attorney - Whether a mandatory obligation - Whether sale and purchase agreement extinguished by deed of assignment and another agreement of a later date - Allegation of novation - Whether improbable - Whether just and equitable for court to grant specific performance*

CONTRACT: *Remedies - Specific performance, application for - Breach of terms of agreement - Failure to grant power of attorney to plaintiff - Whether a mandatory obligation - Whether just and equitable for court to grant specific performance*

This was the plaintiff's application by way of a summons in chambers in encl. 7 for summary judgment in an action for specific performance of a contract for the sale and purchase of a piece of land ('the land'). By a sale and purchase agreement dated 2 April 1999, the first defendant agreed to sell and the plaintiff agreed to purchase the land. Under the term of the sale and purchase agreement by cl. 3.3 it was agreed that the first defendant would grant a power of attorney to the plaintiff for the purpose of developing the land. On 8 April 1999, the first defendant and the second defendant entered into a deed of assignment whereby the former agreed to assign all the proceeds arising from the sale and purchase agreement to the second defendant in consideration of the sum of RM15 million paid by the second defendant to the first defendant. There was also an agreement dated 8 April 1999 between the plaintiff and the second defendant where the latter had agreed to accept

from the plaintiff payment of proceeds under the sale and purchase agreement in the manner as set out in the assignee agreement. In compliance with its obligations under the sale and purchase agreement and the assignee agreement, the plaintiff had proceeded to apply for and obtained approvals for all the relevant plans for the development of the land. However, the plaintiff was unable to proceed further when it could not apply for the developer's licence and the advertising permit without the power of attorney from the registered proprietor of the land, namely, the first defendant.

By way of a letter dated 17 November 2003, the plaintiff demanded that the first defendant grant/or execute a power of attorney in favour of the plaintiff in compliance with the said cl. 3.3 of the sale and purchase agreement within seven days from the said letter. The first defendant failed and neglected to do so. It was the stand of the plaintiff that it had suffered losses and incurred damages. Furthermore, by reason of the aforesaid, the plaintiff was unable to fulfill its obligations under the assignee agreement towards the second defendant. The plaintiff submitted that it was entitled to specific performance of the sale and purchase agreement that was executed between the plaintiff and the first defendant dated 2 April 1999 pursuant to O. 81 of the Rules of the High Court 1980 ('RHC'). The defendants, however, alleged that there was novation in law wherein the sale and purchase agreement had been discharged or replaced by the said deed of assignment dated 8 April 1999 and said agreement dated 8 April 1999.

Held (order in terms of encl. 7)

[1] Clause 3.3 of the sale and purchase agreement dated 2 April 1999 states that the first defendant 'shall grant' to the plaintiff a power of attorney to be prepared, stamped and registered at the High Court; this was, in fact, a mandatory obligation posed on the first defendant. The wording of cl. 3.3 of the sale and purchase agreement was clear and unequivocal and the court must give effect to it because the said clause could be specifically enforced without the need of supervision for its performance. Damages would not be an adequate remedy since cl. 3.3 of the sale and purchase agreement involved the rights over an immovable property and that the plaintiff was ready and willing to perform its obligation under the sale and purchase agreement. (pp 311 b & d-f)

[2] The defendants' allegation that it need not perform any obligations under the sale and purchase agreement since it had been extinguished by the deed of assignment and agreement dated 8 April 1999 was a fallacy. The terms and conditions of these three legal documents were not mutually exclusive. They supplemented each other and they effectively vary some

of the terms agreed upon between the parties. It was unconscionable for the defendants to now allege that none of them was obliged to perform the first defendant's duties under the sale and purchase agreement. The defendants' allegation of novation was so inconsistent with contemporaneous documents and was so improbable. The deed of assignment dated 8 April 1999 and the agreement dated 8 April 1999 did not extinguish the liabilities and obligations of the first defendant under the sale and purchase agreement dated 2 April 1999. (pp 314 d-h & 315 a, e-g)

[3] The sale and purchase agreement did not provide for any condition precedent to be fulfilled by the plaintiff before the first defendant granted the power of attorney to the plaintiff. There was also no requirement that the plaintiff must first produce proof to justify the need for a power of attorney. The first defendant had no discretion to decide whether or not to execute and deliver the power of attorney. (p 317 a-b)

[4] It was just and equitable for this court to grant specific performance of the sale and purchase agreement because the plaintiff had expended a substantial amount of money on the land based on the defendants' promise to comply with its obligations under the sale and purchase agreement in particular its obligation to execute a power of attorney in the plaintiff's favour. The court thus granted summary judgment to be entered for specific performance of the sale and purchase agreement as prayed for in encl. 7. (p 320 d-f)

[5] In the alternative, the plaintiff had prayed for damages *in lieu* of specific performance against the first defendant. In this connection, reference to cl.9 of the sale and purchase agreement should be made. That clause stipulated that in the event of default the purchaser (referring to the plaintiff) may in lieu of specific performance elect to sue for damages for breach of contract from the vendor (referring to the first defendant). The first defendant was aware at all material times that construction works would be delayed and that the plaintiff would suffer losses and damages if the power of attorney was not granted. Consequently it was just and proper that the first defendant indemnified the plaintiff on any claims/ demands which the second defendant may bring against the plaintiff under the agreement dated 8 April 1999 entered between the plaintiff and the second defendant. (p 322 c-f)

Case(s) referred to:

Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1986] 1 CLJ 2; [1986] CLJ (Rep) 45 SC ***(refd)***

Bank of Tokyo Ltd v. Mohd Zaini Arshad (Maria Pragasam, Intervenor) [1991] 2 CLJ 989; [1991] 1 CLJ (Rep) 341 HC ***(refd)***

Bigg v. Boyd Gibbins Ltd [1971] 2 All ER 183 ***(refd)***

Brinks Ltd v. Abu-Saleh & Ors (No 1) [1995] 4 All ER 65 ***(refd)***

Chan Kin & Anor v. Chareen Realty Development Sdn Bhd [1989] 1 MLJ 62 ***(refd)***

Chin Yew Loy Holdings Sdn Bhd lwn. Au Metalvest (M) Sdn Bhd [2002] 6 CLJ 141 HC ***(refd)***

Chappell v. Times Newspappers Ltd [1975] 1 WLR 482 ***(refd)***

Chong Hoong & Anor v. Wong Yuen Sang [1976] 1 MLJ 282 ***(refd)***

Chow Yoong Hong v. Tai Chet Siang [1960] 1 MLJ 130 ***(refd)***

Codd v. Delap [1905] 92 LT 510 ***(refd)***

Cud v. Rutter [1720] IP Wms 570 ***(refd)***

Harvela Investments Ltd v. Royal Trust Co of Canada [1985] 2 All ER 966 ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah [1995] 1 CLJ 293 CA ***(refd)***

Lamare v. Dixon [1873] LR 6 HL 414 ***(refd)***

Lee Hoy v. Chen Chi [1971] 1 MLJ 76 ***(refd)***

Lim Sin Oo v. Cheah Tjeng Siong [1989] 1 CLJ 953; [1989] 2 CLJ (Rep) 68 HC ***(refd)***

LYL Hooker Sdn Bhd v. Tevanaigam Savisthri & Anor [1987] 1 CLJ 356; [1987] CLJ (Rep) 179 SC ***(refd)***

M Ratnaval v. S Lourdenadin [1988] 2 MLJ 371 ***(refd)***

Masalam Sdn Bhd v. Ngah Embong & Anor [1998] 2 CLJ 817 CA ***(refd)***

Milward v. Earl of Thanet [1801] 5 Ves 720 ***(refd)***

Narayanan Chettiar Raman Chettiar v. Samuel Jivamoney Dass Chelliah [1986] 1 CLJ 579; [1986] CLJ (Rep) 547 HC ***(refd)***

Nik Mohamed Salleh v. Tengku Besar Zabidah [1971] MLJ 73 ***(refd)***

Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York [1998] 1 CLJ 424 CA ***(refd)***

Polygram Records Sdn Bhd v. The Search [1994] 3 CLJ 806 HC ***(refd)***

Quadrat Visual Communications Ltd v. Hutchison Telephone UK [1993] BCLC 442 ***(refd)***

Rainbow Estates Ltd v. Tokenhold Ltd [1998] 2 All ER 860 ***(refd)***

Ruby Construction Sdn Bhd v. Sun Metal Works Sdn Bhd [1997] 3 CLJ Supp 183 ***(refd)***

Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd [1989] 2 CLJ 142; [1989] 1 CLJ (Rep) 154 SC ***(refd)***

Stickney v. Keeble [1915] AC 386 ***(refd)***

Storer v. Manchester City Council [1974] 3 All ER 824 ***(refd)***

Syed Azman Syed Mohamed v. Lian Seng (KL) Construction Co Sdn Bhd [1992] 4 CLJ 2194; [1992] 3 CLJ (Rep) 625 HC ***(refd)***

Tan Sri Khoo Teck Puat v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***
Tito v. Waddell (No 2) [1977] Ch 106 ***(refd)***
Vambadi Vairapperumal v. Sinniah Sellamuthu [1998] 1 LNS 609 ***(refd)***
Wilson v. Northampton and Banbury Junction Rly Co [1874] 9 Ch App 279 ***(refd)***
Yap Mong Siew & Ors v. Leong Hum [1998] 3 CLJ Supp 513 ***(refd)***
Yeong Ne Hong lwn. Bumida Engineering and Construction Sdn Bhd [1996] 4 MLJ 350 ***(refd)***
Zaibun Sa Syed Ahmad v. Loh Koon Moy [1982] CLJ 457; [1982] CLJ (Rep) 58 PC ***(refd)***
Zainab Mohamed v. Syarikat Permodalan Johor (PP) Sdn Bhd [1998] 4 CLJ Supp 262 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 63
Rules of the High Court 1980, O. 14, O. 81 rr. 1(2), 3
Specific Relief Act 1950, ss. 11(1), 18

Other source(s) referred to:
ICF Spry, *The Principles of Equitable Remedies*, 5th edn, p 78
PV Baker & PSTJ Langan, *Snell's Principles of Equity*, 28 edn, pp 569, 570
RP Meagher, WMC Gummow & JRF Lehane, *Equity Doctrines and Remedies*, 3rd edn, para 2004

For the plaintiff - Leong Wai Hong (Claudia Cheah Pek Yee & Sharon Tan Geok Bee); M/s Skrine
For the defendants - Ringo Low Kim Leng; M/s Ringo Low & Assoc

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Malik Ishak J:

Introduction

This was the plaintiff's application by way of a summons in chambers in encl. 7 for summary judgment in an action for specific performance of a contract for the sale and purchase of a piece of land held under GM 1530 and known as Lot 798, Mukim of Batu, District of Kuala Lumpur, Wilayah Persekutuan measuring approximately 13,516.5 square metres in area (hereafter referred to as the "land"). Everything revolved on the sale and purchase of that land. This judgment focussed on O. 81 of the Rules of the High Court 1980.

Facts Of The Case

By a sale and purchase agreement dated 2 April 1999, the first defendant agreed to sell and the plaintiff agreed to purchase the land at the total consideration of RM15 million. It was a term of the sale and purchase agreement that the land would be developed into a mixed residential and

commercial development by the plaintiff. And under the term of the sale and purchase agreement it was agreed that the first defendant would grant a power of attorney to the plaintiff for the purpose of developing the land. This was clearly set out in cl. 3.3 of the sale and purchase agreement which reads as follows:

> 3.3 At the request of the purchaser, the vendor will remain the registered proprietor of the said land notwithstanding the completion of this agreement as stipulated in clause 3.3 hereof provided the vendor shall grant to the purchaser a power of attorney to be prepared stamped and registered at the High Court at the purchaser's expense to sign and execute all lawful deeds documents and agreements which are related to:
>
> (a) the application for the approval of the buildings and other plans connected with the construction of the buildings and the commercial lots and the development of the project;
>
> (b) the application for the sub-division and issuance of separate strata titles of the buildings and the commercial lots;
>
> (c) the sale and transfer of the buildings to the end purchasers thereof in compliance with the Housing Developer's (Control and Licensing) Act 1966 and the sale and transfer of the commercial lots to the purchasers thereof; and
>
> (d) the assignment (if necessary) of the buildings and the commercial lots by the aforesaid end purchasers in favour of their respective end-financiers by way of security for any facility granted by the end-financier to the said purchasers to finance the purchase of the said buildings and commercial lots.

The other relevant terms of the sale and purchase agreement would be cl. 9. That clause states as follows:

> 9.1 In the event of any breach of this agreement by the vendor or the vendor shall wilfully fail or refuse to complete this transaction, the purchaser shall be entitled to take such action as may be available to the purchaser at law to enforce specific performance of this agreement against the vendor or *in lieu* thereof to elect to sue for damages for breach of contract from the vendor without prejudice to any rights which the purchaser may be entitled against the vendor in respect of the antecedent breach of this agreement.

Two other clauses of the sale and purchase agreement must be mentioned. They are cls. 12 and 13 and they are worded as follows:

12. It is hereby agreed that the vendor may at its absolute discretion assign all its rights interests and benefits under this agreement to a third party and the purchaser will upon the request of the vendor endorse its consent thereto.

13. Time wherever mentioned shall be of the essence of this agreement.

There was a deed of assignment dated 8 April 1999 entered between the first and the second defendants. By this deed of assignment, the first defendant agreed to assign all the proceeds arising from the sale and purchase agreement to the second defendant in consideration of the sum of RM15 million paid by the second defendant to the first defendant. Reference to term 2 of the deed of assignment should be made. There it provides that the second defendant covenanted and undertook with the first defendant to observe, discharge and carry out all the duties, responsibilities, covenants, undertakings, stipulations and obligations on the part of the first defendant as contained in the sale and purchase agreement.

There was also an agreement dated 8 April 1999 between the plaintiff and the second defendant. By this agreement the second defendant agreed to accept from the plaintiff payment of proceeds under the sale and purchase agreement in the manner as set out in the assignee agreement.

In consideration of the acceptance of the proceeds in kind by the second defendant, the plaintiff has undertaken various obligations under the assignee agreement towards the development of the land. Under cl. 10 of the assignee agreement, time wherever mentioned therein shall be the essence of the agreement.

In compliance with its obligations under the sale and purchase agreement and the assignee agreement, the plaintiff has proceeded to apply for and obtained approvals for all the relevant plans including the layout plans, buildings plans, earthwork plans and approvals from the Foreign Investment Committee. Furthermore, the plaintiff has even proceeded with the development on the land in that it has erected hoarding around the land, mobilised its plant, equipment, machinery and labour force thereon and has completed test piling and commenced earthworks thereon.

But, all said and done, the plaintiff was unable to proceed further with the development in that it was unable to apply for the developer's licence and the advertising permit without the power of attorney from the registered proprietor of the land, namely, the first defendant. This constituted the breach of contract by the first defendant, so submitted the plaintiff.

Incidentally, there was also a deed of indemnity dated 2 April 1999 between the plaintiff, the first defendant and Pilecon Engineering Berhad. By this deed of indemnity, Pilecon Engineering Berhad agreed to indemnify the first defendant in respect of a banking facility executed by the first defendant over the said land.

Now, despite the plaintiff's numerous oral and written requests by way of a letter from Pilecon Engineering Berhad to Messrs Hamzah Sulaiman & Partners, solicitors for the first defendant dated 18 July 2003 and the plaintiff's letters dated 27 February 2003, 16 April 2003, 24 April 2003, 12 May 2003, 29 May 2003 and 27 June 2003 requesting the first defendant to grant and/ or execute a power of attorney to the plaintiff, the first defendant has in breach of the sale and purchase agreement in particular cl. 3.3 thereof failed, refused and/ or neglected to do so. By way of a letter dated 17 November 2003 from the plaintiff's solicitors Messrs Skrine to the first defendant's solicitors Messrs Hamzah Sulaiman & Partners, the plaintiff demanded that the first defendant grant and/or execute a power of attorney in favour of the plaintiff in compliance with cl. 3.3 of the sale and purchase agreement within seven (7) days from the date of the said letter. But the first defendant again failed refused and/or neglected to do so. It was the stand of the plaintiff that it had suffered losses and incurred damages in that it had incurred substantial sums for the development of the land. Furthermore, by reason of the aforesaid, the plaintiff was unable to fulfill its obligations under the assignee agreement towards the second defendant. It was the stand of the plaintiff that it was entitled to be indemnified by the first defendant against any claim or demand that may be brought against the plaintiff by the second defendant under the assignee agreement.

The obligations of the second defendant under the deed of assignment may be stated in this way. That the second defendant having agreed under the deed of assignment to observe, discharge and carry out all the duties, responsibilities, covenants, undertakings, stipulations and obligations on the part of the first defendant as contained in the sale and purchase agreement, was obliged to secure the granting of the power of attorney by the first defendant in favour of the plaintiff. However, despite numerous oral and written requests by way of two letters both dated 27 June 2003 from the plaintiff, the second defendant has failed, refused and/or neglected to procure the granting of the power of attorney by the first defendant to the plaintiff (see exh. "A7" of encl. 6 that exhibited these two letters). The stand of the plaintiff was this. That it was ready and willing, at all material times, to continue to perform its obligations under the sale and purchase agreement dated 2 April 1999 as well as the assignee agreement dated 8 April 1999.

The Prayers Sought For In encl. 7 By The Plaintiff

By way of encl. 7, the plaintiff sought for the following prayers:

Against the First Defendant

(1) an Order pursuant to Order 81 of the Rules of the High Court 1980 for the specific performance of the Sale and Purchase Agreement dated 2nd April 1999 that was executed between the Plaintiff and the first Defendant;

(2) the specific performance of Clause 3.3 of the said Sale and Purchase Agreement dated 2nd April 1999 that is referred to in the Writ and Statement of Claim and that is mentioned in the terms of the Minutes enclosed herein;

(3) an Order that at the First Defendant's refusal to execute the Power of Attorney pursuant to Clause 3.3 of the Sale and Purchase Agreement dated 2nd April 1999 between the Plaintiff and the First Defendant within seven (7) days from the date of this Order, the Registrar of this Court be given the power to execute the Power of Attorney;

(4) damages for the breach of contract in lieu of specific performance;

(5) damages in addition to specific performance;

(6) repayment of the deposit to the plaintiff that was paid to the First Defendant under the Sale and Purchase Agreement in the amount of RM100,000.00 with interest at 8% per year from 2-3-1999 until the date of full payment;

(7) a lien on the said Land in favour of the Plaintiff for repayment of the amount of RM100,000.00; damages, interest and costs awarded in this action against the First Defendant; (and)

(8) a declaration that the First Defendant indemnifies the Plaintiff on any claims or demands that might be brought against the Plaintiff by the Second Defendant under the Agreement dated 8th April 1999 between the Plaintiff and the Second Defendant.

Against the Second Defendant

(9) A declaration that the Plaintiff is not liable to the Second Defendant for any loss or damage in relation to the Agreement dated 8th April 1999 between the Plaintiff and the Second Defendant.

Against the First and Second Defendants

(10) interest at the rate of 8% per year on any amount awarded by this Court to the Plaintiff from 28th July 2000 until the date of full payment;

(11) costs to be paid by the First Defendant and Second Defendant; (and)

(12) any order, direction or other relief whatsoever as this Honourable Court deems just and reasonable.

The grounds in support of encl. 7 were simply that the plaintiff was entitled to specific performance of the sale and purchase agreement that was executed between the plaintiff and the first defendant dated 2 April 1999 pursuant to O. 81 of the Rules of the High Court 1980 ("RHC").

Order 81 of the RHC relates to the procedure for summary judgment and it applies to any action begun by writ indorsed with a claim. It has the same procedural objective as O. 14 of the RHC in that it provides for a speedy mechanism for obtaining summary judgment without proceeding to a trial. It is certainly effective in an action for specific performance for the sale and purchase of a piece of land where there is no defence to the action at all. It must be borne in mind that an application for summary judgment under O. 81 of the RHC may be filed notwithstanding the fact that the defendant has not entered an appearance (*Alloy Automotive Sdn. Bhd. v Perusahaan Ironfield Sdn. Bhd.* [1986] 1 CLJ 2; [1986] CLJ (Rep) 45 and O. 81 r. 1(2) of the RHC). It is also ideal to note that an application under O. 81 of the RHC must relate to the whole action at hand. Of course, the remedy for specific performance is enshrined in the Specific Relief Act 1950 and it is entirely discretionary (*Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd* [1989] 2 CLJ 155; [1989] 1 CLJ (Rep) 154, SC; and *Yeong Ne Hong lwn. Bumida Engineering and Construction Sdn Bhd* [1996] 4 MLJ 350) and it is also ideal to enforce an agreement, whether in writing or not, for the sale and purchase of a property as exemplified in *Bank of Tokyo Ltd v. Mohd Zaini bin Arshad (Maria Pragasam, Intervenor)* [1991] 2 CLJ 989; [1991] 2 CLJ (Rep) 341; *Chong Hoong & Anor. v. Wong Yuen Sang* [1976] 1 MLJ 282; *Chan Kin & Anor v. Chareen Realty Development Sdn Bhd* [1989] 1 MLJ 62; and *Masalam Sdn Bhd v. Ngah bin Embong & Anor* [1998] 2 CLJ 817, CA. Specific performance too is effective in ordering the delivery of strata title as seen in the case of *Syed Azman bin Syed Mohamed v. Lian Seng (KL) Construction Co Sdn Bhd* [1992] 4 CLJ 2194; [1992] 3 CLJ (Rep) 625. It has often been said that an order for summary judgment under O. 81 of the RHC should only be made in a plain case and where there is no necessity for a trial (*Bigg v. Boyd Gibbins Ltd* [1971] 2 All ER 183 at 184, [1971] 1 WLR 913 at 915, CA). Such a procedure is also ideal where the defence put forward is obviously "frivolous and practically moonshine" (*Codd v. Delap* [1905] 92 LT 510 at 511, HL per Lord Lindley). The court is empowered after hearing an O. 81 application to give judgment to the plaintiff (r. 3 of O. 81 of the RHC) unless the defendant succeeds in satisfying the court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the action (r. 3 of O. 81 of the RHC).

Specific Performance

The relief of specific performance is liberally and generously granted so long as the circumstances warrant it. There is no necessity on the part of the plaintiff to show:

(a) that the plaintiff has in the past strictly and literally complied with all its obligations under the contract; or

(b) that the defendant has committed a breach of the contract.

In support of this proposition of the law, reference should be made to the write-ups in the following text books:

(1) *Snell's Principles of Equity,* 28th edn by P.V. Baker and P.ST.J. Langan at p. 569:

> (c) No breach required. Although in most cases no action for specific performance will be commenced until a breach of the contract has occurred, a breach is not an essential part of the cause of action in equity. Whereas the breach is of the essence of an action for damages at law, an action for specific performance is based on the mere existence of the contract, coupled with circumstances which make it equitable to grant a decree (*Hasham v. Zenab* [1960] AC 316; and see [1960] 76 LQR 200).

(2) *Equity Doctrines and Remedies*, 3rd edn by RP Meagher, WMC Gummow, and JRF Lehane at para. 2004;

> [2024] It is, however, established that these principles do not require the plaintiff, in order to succeed in his suit for specific performance, to show that he has in the past strictly and literally complied with all his obligations under the contract (see *Fuller's Theatres Ltd v. Musgrove* [1923] 31 CLR 524) or that he is ready and willing to perform strictly and literally his obligations in future (*Bahr v. Nicolay (No 2)* [1988] 164 CLR 604 at 619-20). The position is explained by the High Court in *Mehmet v. Benson* [1965] 113 CLR 295. The plaintiff was a purchaser of land under a terms contract. Payments due by him under the contract were, and had for some years been, substantially in arrears, yet he obtained a decree of specific performance. Barwick CJ said at 307-8:
>
> The question as to whether or not the plaintiff is ready and willing to perform the contract is one of substance not to be resolved in any technical or narrow sense. It is important to bear in mind what is the substantial thing for which the parties contract and what on the part of the plaintiff in a suit for specific performance are his essential obligations. Here the substantial thing for which the defendant bargained was the payment of the price; and, unless time be and remain of the essence, he

obtained what he bargained for if by the decree he obtains his price with such ancillary orders as recompense him for the delay in its receipt. To order specific performance in this case would not involve the court in dispensing with anything for which the vendor essentially contracted. ... But it is the essential terms of the contract which he must be ready and willing to perform. He seeks a transfer of the interest in land, the subject of the contract: the counterpart obligation is the payment of the price. In consideration the question of the plaintiff's readiness and willingness in this respect in this case there are many factors. His default in paying the instalments of the price, whilst not conclusive, is amongst these factors. ... In my opinion, not-withstanding the defaults of the plaintiff in the payment of the instalments of price, he was not unready or unwilling to perform the contract in its essential terms, specific performance ought to have been granted. (See also *Besant v. Woo* [1879] 12 Ch D 605; *Dyster v. Randall* [1926] Ch 932; *Hill v. Barclay* [1811] 18 Ves 56; 34 ER 238; *Swain v. Ayers* [1888] 21 QBD 289; *Telegraph Despatch & Intelligence Co v. McLean* [1873] LR 8 Ch 658; and *Powell v. Whyte* [1968] Qd R 255).

Nor is it necessarily fatal that the plaintiff asserts a wrong view of the contract which he believes to be correct, provided that the view is not untenable and that the plaintiff is willing to perform the contract according to what transpires to be its true tenor. Thus in *Green v. Sommerville* [1979] 141 CLR 594, the High Court held the principle applied in favour of a plaintiff who had insisted on an oral variation of the contract which the Court determined against her.

(3) *The Principles Of Equitable Remedies* by I.C.F. Spry, 5th edn at p. 78:

So it has been said that 'proceedings for the specific performance of a contract which is of such a kind that it can be specifically enforced can be commenced as soon as one party threatens to refuse to perform the contract or any part thereof or actually refuses to perform any promise for which the time of performance has arrived.' (*Turner v. Bladin* [1951] 82 CLR 463 at p. 472. In *Hasham v. Zenab* [1960] AC 316 at p. 329 it was said, 'In equity all that is required is to show circumstances which will justify the intervention by a court of equity).' This principle may be applied even though the term of which the breach is threatened is conditional and the condition has not yet been fulfilled. (Where an obligation is conditional an order of specific performance may be made in a conditional form and by ancillary orders the defendant may be enjoined from performing acts that are inconsistent with his positive obligations). Further, it is not essential that there should have been an explicit threat not to perform the material obligation. They must be more than a theoretical or remote possibility of a breach, but otherwise a greater or lesser probability that there will be a failure to perform may be found to be sufficient in the general circumstances; and in particular the degree of

> probability of a future breach that must be shown before the court will intervene depends on the extent of hardship that the plaintiff may suffer if the breach occurs and on any other such matters that bear on the justice or injustice of granting relief immediately.

The bottom line is this. That even if the plaintiff was said to be in breach of any of the agreements as alluded to earlier or that it has not complied strictly and literally with all its obligations thereunder (which the plaintiff vehemently denied), the court could still order the first defendant to specifically perform its obligations under the sale and purchase agreement dated 2 April 1999. Furthermore, even if the court were to find that the plaintiff has failed to show any breach of contract on the part of the defendants, the relief of specific performance was still open to the plaintiff.

I must exercise my discretion in favour of granting the relief of specific performance. It is trite law that specific performance would be ordered where damages is not an adequate remedy as envisaged under s. 11(1) of the Specific Relief Act 1950. There is a statutory presumption in s. 11(2) of the Specific Relief Act 1950 that damages is not an adequate remedy in a contract to transfer immovable property. The burden to rebut this presumption lies on the defendants. Section 11(2) of the Specific Relief Act 1950 enacts as follows:

> Unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved.

It was rightly submitted that the statutory presumption under s. 11(2) of the Specific Relief Act 1950 applies in favour of the plaintiff and that it has not been rebutted by the defendants. In *Snell's Principles of Equity*, the learned authors wrote at p. 570:

> 2. **Contracts relating to land.** The commonest case in which the court specifically enforces a contract is where the contract is for the sale of land or for the granting of a lease. Contracts relating to land differ greatly from contracts respecting most goods, because the land may have a peculiar value to the purchaser or lessee. Where the necessary conditions are satisfied, the court will therefore almost invariably decree specific performance of a contract regarding land, even if the interest to be granted is no more than a licence of short duration (*Verrall v. Great Yarmouth B.C.* [1981] QB 202 (use of meeting hall for two days)); and where the contracting parties are within the jurisdiction this willingness to decree specific performance extends even to land out of the jurisdiction (*Penn v. Lord Baltimore* [1750] 1 Ves. Sen. 444; 1 W. & T.L.C. 638).

I have in *Zainab Mohamed v. Syarikat Permodalan Johor (PP) Sdn Bhd* [1998] 4 CLJ Supp 262 at p. 280 to p. 281 set out the law in regard to specific performance in these words:

> Simply put, specific performance is an equitable relief given by the court to enforce against a defendant the duty of doing what he agreed by contract to do. The plaintiff may obtain judgment for specific performance even though there has not been, in the strict sense of the word, any default by the defendant before the issue of the writ (*Hasham v. Zenab* [1960] AC 316, [1960] 2 WLR 374 PC; *Oakacre Ltd v. Claire Cleaners (Holdings) Ltd* [1982] Ch 197, [1981] 3 All ER 667). It can be seen that the remedy of specific performance is in sharp contrast with the remedy by way of damages for breach of contract – where the court orders pecuniary compensation for failure to carry out the terms of the contract. The remedy of specific performance is both special and extraordinary in character, and the court has a discretion either to grant it or to leave the parties to their rights at law (*Re Scott and Alvarez's Contract, Scott v. Alvarez* [1895] 2 Ch 603 at 612, 615 CA; and *Jobson v. Johnson* [1989] 1 All ER 621, [1989] 1 WLR 1026 CA). The judge, as I said, must exercise his discretion in a judicial manner (*Revell v. Hussey* [1813] 2 Ball & B 280 at 288; and *Conlon v. Murray* [1958] NI 17). The contract must be within the category of contracts of which specific performance will be granted, a striking example of contracts outside the scope of the remedy would be *Robertson v. St. John* [1786] 2 Bro CC 140, where a promise to renew a lease in consequence of money already laid out was held *nudum pactum* and specific performance was refused. I might as well point out that for the remedy of specific performance to be invoked the following conditions must be fulfilled:
>
> (1) the contract is valid in form; and
>
> (2) has been made between competent parties; and
>
> (3) is unobjectionable in its nature and circumstances.
>
> It is correct statement of the law to say that specific performance is granted as a matter of course (*Hall v. Warren* [1804] 9 Ves 605 at 608) and this is so even though the judge feels that it is favourable to one party and not the other (*Haywood v. Cope* [1858] 25 Beav 140). The defendant, however, is not left without legal recourse for if the defendant can rely on one of the recognised equitable defences then the defendant can avoid the contract. It may be inequitable to enforce the contract if there is delay, acquiescence, breach on the plaintiff's part or for that matter some other circumstance outside the contract (*Clowes v. Higginson* [1813] 1 Ves & B 524 at 527; *Leech v. Schweder* [1874] 9 Ch App 465 n at 467 n; and *Re Terry and White's Contract* [1886] 32 Ch D 14 at 27, CA).

> In my judgment, in the context of the present case, there was a concluded contract binding in law as all the formalities had been observed. In particular, the parties have agreed on all the essential terms of the contract with the terms sufficiently certain and precise so that this court can order and easily supervise the performance of that contract.

I will now briefly examine the conditions as set out in *Zainab Mohamed* to the facts of the present case, in particular to encl. 7.

The First Condition: That The Contract Is Valid In Form

It cannot be doubted and it was not disputed that the contract that was sought to be specifically enforced by the plaintiff – referring to the sale and purchase agreement dated 2 April 1999, is valid in form. In actual fact, the existence and the terms of the sale and purchase agreement were admitted by the defendants in their defence. Moreover, the terms sought to be enforced by the plaintiff in particular cl. 3.3 of the sale and purchase agreement were phrased and framed in a precise and clear language. It categorically stated that the first defendant "shall grant" to the plaintiff a power of attorney.

The Second Condition: That The Contract Has Been Made Between Competent Parties

Without a doubt, both the plaintiff and the defendants are competent parties under the law. This condition has been fulfilled to the hilt.

The Third Condition: That The Contract Is Unobjectionable In Its Nature And Circumstances

There was nothing objectionable about the sale and purchase agreement dated 2 April 1999. It was a concluded contract for the sale and purchase of a piece of land for a mixed residential and commercial development. It was a legally enforceable contract giving rise to obligations for the parties thereto. In *Storer v. Manchester City Council* [1974] 3 All ER 824 at 828, Lord Denning aptly said:

> In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract.

Indeed there was a concluded contract here and there was nothing objectionable in ordering the first defendant to specifically perform its obligation under the sale and purchase agreement, in particular to grant a power of attorney to the plaintiff for the development of the land.

Analysis

At the outset, I must categorically say that the defendants have not raised any triable issues in their affidavits. This was certainly a clear cut case for summary judgment for the following reasons:

(1) clause 3.3 of the sale and purchase agreement dated 2 April 1999 states in plain language that the first defendant "shall grant" to the plaintiff a power of attorney to be prepared stamped and registered at the High Court; this was, in fact, a mandatory obligation imposed on the first defendant;

(2) despite the plaintiff's repeated requests and reminders, the first defendant has refused to grant the power of attorney to the plaintiff;

(3) the fact of the matter is this – that until today cl. 3.3 of the sale and purchase agreement has not been performed by the first defendant;

(4) the defendants' say that they saw no need for the power of attorney, but with respect, this was not a relevant consideration;

(5) the wording of cl. 3.3 of the sale and purchase agreement is clear and unequivocal and the court must give effect to it because the said clause can be specifically enforced without the need of supervision for its performance;

(6) that damages would not be an adequate remedy since cl. 3.3 of the sale and purchase agreement involves the rights over an immovable property; and

(7) that the plaintiff was and still is ready and willing to perform its obligations under sale and purchase agreement.

The arguments advanced by the defendants were designed to confuse the facts even though the facts were fairly clear. Factually speaking, I must state the following salient points:

(1) that the sale and purchase agreement dated 2 April 1999 sets out in detail the rights, benefits and obligations of both the parties pertaining to the sale of the land and one of the obligations of the first defendant includes the obligation to grant the plaintiff a power of attorney over the land;

(2) by way of a deed of assignment dated 8 April 1999 between the first defendant and the second defendant, the first defendant assigned all the proceeds arising from the sale and purchase agreement to the second defendant;

(3) the "assignment" mentioned in the deed of assignment relates to the proceeds under the sale and purchase agreement which the first defendant was entitled to receive;

(4) that the proceeds under the sale and purchase agreement were the rights of and the benefits to be received by the vendor – referring to the first defendant, and they were not an obligation imposed on the first defendant; consequently, only the rights and benefits of the first defendant under the sale and purchase agreement were assigned to the second defendant by way of the deed of assignment;

(5) that the deed of assignment does not provide for the assignment of the obligations of the first defendant under the sale and purchase agreement to the second defendant but it does contain a covenant given by the second defendant to the first defendant that the second defendant would "observe discharge and carry out all the duties responsibilities covenants undertakings stipulations and obligations on the part of the assignor or as contained in the sale and purchase agreement;

(6) that the covenant to perform is entirely a matter between the first and the second defendants only;

(7) that the obligations of the first defendant towards the plaintiff under the sale and purchase agreement including the obligation to grant the power of attorney to the plaintiff under cl. 3.3 of the sale and purchase agreement remain with the first defendant; and

(8) if the first defendant fails to perform its obligations under the sale and purchase agreement the plaintiff is entitled to sue the first defendant; it does not matter that the first defendant had procured a promise from the second defendant to the effect that the second defendant would carry out the first defendant's obligations under the sale and purchase agreement on its behalf because that arrangement is entirely an arrangement between the first defendant and the second defendant – it has nothing to do with the plaintiff.

At this juncture, it would be appropriate to consider the other issues raised by the defendants not in its order of importance.

The Alleged Delay In Filing The Summons In Chambers In Encl. 7

It was rather unfortunate that the defendants had never raised the issue of delay in any of the affidavits filed earlier. As a consequence thereto, the plaintiff did not answer the allegation of delay, if any, by way of an affidavit.

The law is clear. That delay, if any and the plaintiff does not admit it, does not per se defeat any application for summary judgment. The defendants relied heavily on the case of *Ruby Construction Sdn Bhd v. Sun Metal Works Sdn Bhd* [1997] 3 CLJ Supp 183, a High Court decision that was decided on 25 October 1996 by the learned Judicial Commissioner and that decision has been superceded, with respect, by the Court of Appeal decision of *Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York* [1998] 3 MLJ 818 with a coram of Gopal Sri Ram, NH Chan and Mahadev Shankar JJCA which decided that delay *per se* will not defeat an application for summary judgment and the headnotes of the Court of Appeal decision merit reproduction (see p. 818 of the report):

Held, dismissing the appeal.

[1] (Per Gopal Sri Ram JCA) There is nothing to suggest that an application for summary judgment may be defeated solely on the ground that there has been a delay in moving the court. In this case, as the judge was of the opinion that the issues raised by the appellants were a sham, he would have been entitled to enter judgment for the respondent. However, in the exercise of discretion, he had decided to grant conditional leave. If the trial judge erred in granting conditional leave instead of judgment for the respondent, the error was one that prejudiced the respondent, not the appellants. The present case therefore did not warrant appellate interference (see pp 821D, I and 822A); *Comptroller-General of Inland Revenue, Malaysia v. Weng Lok Mining Co Ltd* [1969] 2 MLJ 98 and *McLardy v. Slateum* [1890] 24 QBD 504 followed.

[2] (Per NH Chan JCA) An application for leave to sign judgment under O. 14 r. 1 of the Rules of the High Court 1980 need not necessarily be made before the defendant has delivered his defence. A defendant may show cause by 'affidavit or otherwise' and the term 'or otherwise' allows the defendant to do so by delivering a defence. Therefore, delay in applying for O. 14 is no ground for defeating the plaintiff's right to summary judgment under O. 14 when there is no real defence disclosed (see p 822E, F, G); *McLardy v. Stateum* [1890] 24 QBD 504, *Comptroller-General of Inland Revenue, Malaysia v. Weng Lok Mining Co Ltd* [1969] 2 MLJ 98, *Jacobs v. Booth's Distillery Co* [1901] 85 LT 262 and *Krishnamurthy & Anor v. Malayan Finance Corp Bhd* [1986] 2 MLJ 134 followed; *Societe des Etains de Bayas Tudjuh v. Who Heng Mining Kongsi* [1978] 2 MLJ 267 not followed.

In *Yap Mong Siew & Ors v. Leong Hum* [1998] 3 CLJ Supp 513, the High Court Judge correctly held that the delay in that case did not constitute a triable issue nor did delay per se prevent the plaintiffs there from securing summary judgment against the defendant there.

In my opinion, the avoidance of a trial should be the primary consideration in a summary judgment application. And that the delay in filing, no matter how long, is irrelevant and is of no consequence at all. In *Brinks Ltd v. Abu-Saleh and Others (No 1)* [1995] 4 All ER 65, on the issue of delay, Jacob J aptly said at p. 68 to p. 69 of the report:

> But otherwise I can see no objection to a late application for judgment under Ord 14. Indeed, in some cases, and I think this is one, its use may be commendable as saving both the extra costs and time involved in a full trial. If these defendants truly have no defence it is worse and pointless for them to be present at the trial, which will be complex enough without them. The plaintiffs are right to clear the decks as far as possible before trial.

Using these authorities as authoritative guidelines, the upshot of it all would be this. That even if there was a delay in the filing of encl. 7, it did not per se preclude the plaintiff from obtaining summary judgment because, clearly on the evidence, there was no defence to this action and that there was no issue which ought to be tried.

Novation And The Extinguishment Of The Sale And Purchase Agreement

The defendants alleged that there was novation in law wherein the sale and purchase agreement has been discharged or replaced by the deed of assignment dated 8 April 1999 and the agreement dated 8 April 1999. The defendants pointed out that the parties need not perform any obligations under the sale and purchase agreement since it has been extinguished. To say the least, it was a fallacy to hold onto this notion. The terms and conditions of these three legal documents are not mutually exclusive. Rather they supplement each other and they effectively vary some of the terms agreed upon between the parties in this way:

(1) that the sale and purchase agreement governs the sale of the land by the first defendant to the plaintiff and lays down the rights and benefits and obligations of both the vendor – referring to the first defendant, and the purchaser – referring to the plaintiff, pertaining to the sale of the land;

(2) that the deed of assignment governs the assignment of the rights and benefits of the first defendant in relation to the proceeds under the sale and purchase agreement to the second defendant; and

(3) that the agreement dated 8 April 1999 governs the method in which the proceeds under the sale and purchase agreement should be delivered by the plaintiff to the second defendant in that the proceeds are no longer in monetary terms but rather by way of units, car parks, and the net saleable areas of commercial units amounting to 35% from the development.

It cannot be the parties' intention to extinguish the sale and purchase agreement by way of the deed of assignment or by way of the agreement. In fact and in reality, the sale and purchase agreement was referred to many times in both the deed of assignment and the agreement. Evidential wise, recital 2, cl. 2, cl. 3 and cl. 4 of the deed of assignment would bear this out. Even recital 1 and recital 2 of the agreement would bear witness to this. In addition to all these, even the second defendant in its own letter made reference to the sale and purchase agreement and informed the plaintiff that it would carry out the duties of the first defendant under the sale and purchase agreement. The second defendant further admitted that the sale and purchase agreement was merely varied by the agreement dated 8 April 1999. The second defendant's letter dated 7 May 2003 to the plaintiff as seen at exh. "WJJ3" of the defendants' affidavit dated 19 July 2004, at para. 2 of the letter merits reproduction and it was worded in this way:

> It is within your knowledge that the sale and purchase agreement have been assigned by Messrs Kepong Management Sdn Bhd to us with your consent whereby we shall carry out the duties of Messrs Kepong Management Sdn Bhd under the sale and purchase agreement dated 2.4.1999. The aforesaid sale and purchase agreement have been varied by the agreement dated 8.4.1999 made between you and us.

Approaching encl. 7 with circumspection, I must say that it is unconscionable for the defendants to now allege that none of them is obliged to perform the first defendant's duties under the sale and purchase agreement because the sale and purchase agreement is no longer in existence. A submission along these lines would certainly be in error. I am of the considered view that the defendants' allegation of novation is so inconsistent with contemporaneous documents and they are so inherently improbable that it should be rejected by this court outright. The case of *LYL Hooker Sdn. Bhd. v. Tevanaigam Savisthri & Anor.* [1987] 1 CLJ 356; [1987] CLJ (Rep) 179, SC relied upon by the defendants does not, with respect, assist the defendants at all. On the contrary, it supports the plaintiff's stand that there is no novation in this case at all. There Salleh Abas LP, said:

> Referring to the second objection, there seems to be a confused thinking here. What was transferred from the assignor to the respondents in so far as the matter in issue is concerned, was not liability but a right to have vacant possession of the house delivered within eighteen months from the date of the sale and purchase agreement. The appellant company's liability to deliver vacant possession within that period remained with the appellant company and was not transferred to any one else, though in the discharge of this obligation it has to deliver it to the respondents instead of to the assignor (the original purchaser). This is what the assignment is all about. Moreover, for the deed to amount to a novation, the appellant company must show that there was consideration moving between them and the respondents. Here they fail to do so.

> Novation is a new contract. It extinguishes rights and obligations under the old contract for which the new contract is made. Being a new contract, there must be consent by all parties and there must be consideration, and rights and obligations under it are not those transferred from the old contract which is already extinguished. (See *Chitty on Contract*, Vol. 2, 1983 edition at paragraphs 1315 and 1316).
>
> Looking at the deed we fail to find anything which suggests extinguishment of rights and obligations under the sale and purchase agreement. There is nothing either to show any consideration moving between the appellant company and the respondents, which is a vital requirement for a novation.
>
> We therefore hold that the deed of assignment dated November 29, 1978 was an assignment. This appeal is dismissed with costs. We order that the appeal deposit be paid to the respondents towards taxed costs.

It is ideal to mention that s. 63 of the Contracts Act 1950 on novation is of wider import. Indeed this was the view held by Visu Sinnadurai J in *Polygram Records Sdn Bhd v. The Search* [1994] 3 MLJ 127, [1994] 3 CLJ 806, [1994] 3 AMR 2060 and I certainly share his view. His Lordship Visu Sinnadurai J in that case aptly said:

> Section 63 is not limited in its scope to novation as it is understood under English Law alone, but also covers situations where the parties have rescinded the earlier contract, by substituting a new one. If there is an intention on the part of both the parties to substitute a new contract, the old need not be performed, even if the new merely alters certain terms of the old. The test basically is this: if a new contract is entered into by the parties, whatever its terms, the old contract is extinguished. It does not, however, cover a situation where the terms of the old contract are merely altered or varied, without a new contract in substitution of it being entered into. In such a case, the old contract, as altered or varied, remains in force.

The upshot of it all would be this. That the deed of assignment dated 8 April 1999 and the agreement dated 8 April 1999 did not extinguish the liabilities and obligations of the first defendant under the sale and purchase agreement dated 2 April 1999.

The Allegation That The Request For The Power Of Attorney Is Not In Accordance With The Sale And Purchase Agreement

Clause 3.1 of the sale and purchase agreement basically provides that the first defendant will still remain as the registered proprietor of the land even if the entire sale and purchase agreement has been completed in accordance with cl. 3.1 thereto. It does not mandate the completion of the entire sale and purchase agreement as a condition precedent for the granting of the power of attorney.

In fact, the sale and purchase agreement does not provide for any condition precedent to be fulfilled by the plaintiff before the first defendant grants the power of attorney to the plaintiff. There is also no requirement that the plaintiff must first produce proof to justify the need for a power of attorney. Clause 3.1 of the sale and purchase agreement provides in clear and unequivocal terms that "… the vendor shall grant to the purchaser a power of attorney…" It is therefore couched in a mandatory term thereby imposing a mandatory obligation on the part of the first defendant. The first defendant has no discretion to decide whether or not to execute and deliver the power of attorney (*Chin Yew Loy Holdings Sdn Bhd lwn. Au Metalvest (M) Sdn Bhd* [2002] 6 CLJ 141).

At any rate, the defendants have been very inconsistent in their stand. On the one hand, the defendants say that the sale and purchase agreement had been discharged and replaced. On the other hand, the defendants want to rely on the provision of the sale and purchase agreement in regard to the "condition" for the power of attorney. Such inconsistent stand merely reinforced the fact that the defendants have no *bona fide* defence to this action. To say the least this alleged issue merely constituted a red-herring to distract this court's attention from the facts at hand.

The Plaintiff's Request Does Not Fit In Any Situations Provided In cl. 3.3(a) To (D) Of The Sale And Purchase Agreement

Since the prayer sought for by the plaintiff is for specific performance of cl. 3.3 of the sale and purchase agreement, there is no question of whether or not the power of attorney would fit into any of the situations provided for in cl. 3.3 of the sale and purchase agreement.

No Evidence Of Any Rule Of Law Or Of Any Fact That The Ministry Of Housing Insisted For The Production Of The Power Of Attorney As A Pre-requisite For Obtaining The Developer's Licence And The Advertising Permit

I say that this issue is not a defence to the plaintiff's claim at all. The contemporaneous documents would show and did show that the plaintiff did earnestly and consistently seek to proceed with the development in obtaining the approvals of the building and all the other plans connected with the construction. It must be emphasised that the plaintiff sent numerous letters to the first defendant to provide the power of attorney. By way of evidence, I shall allude to the following documents:

(a) Faxes from the plaintiff dated 21 June 2000, 11 July 2000 and 28 July 2000 issued under the letterhead of Pilecon Engineering Bhd to the first defendant's previous solicitors, namely, Messrs Hamzah Sulaiman & Partners regarding the power of attorney in favour of Mawar Awal (see pp. 21 to 23, 25 and 26 of exh. "B3" of encl. 12).

(b) Letter from the plaintiff to the first defendant's previous solicitors, namely, Messrs Hamzah Sulaiman & Partners dated 27 February 2003 and that letter was worded, *inter alia*, like this (see p. 3 of exh. "A5" of encl. 6):

> We would appreciate it if you could kindly forward to us a copy of the duly executed power of attorney to enable us to obtain the necessary approval from the Ministry of Housing to proceed with the development of the said land.

(c) Letter from the plaintiff to the first defendant dated 16 April 2003 as per pp. 44 and 46 of exh. "A5" of encl. 6 worded in this manner:

> We wish to emphasise that we are earnestly trying to launch the project and have even mobilised equipment onto the site with intention to proceed with foundation works.
>
> We write to remind and again respectfully request from you the power of attorney to execute all deeds documents and agreements relating to the project which you are obliged to grant pursuant to clause 3.3 of the sale and purchase agreement dated 24th April 1999 to enable us to proceed further in obtaining the DL and AP.
>
> We thank you in anticipation and hope to receive the power of attorney within a week from the date of this letter …

(d) Letter from the plaintiff to the first defendant dated 24 April 2003 (see paras. 2 and 3 at p. 47 of exh. "A5" of encl. 6) and it was worded thus:

> We wish to remind you that we have yet to obtain the power of attorney from your goodself …
>
> In view of the rising cost of building material such as steel, timber, cement and their related products, we will appreciate that the power of attorney is released to us as soon as possible to enable us to proceed with the development of the project concerned; as it is, construction cost has increased and we do not wish to incur cost overrun if construction is further withheld.

(e) Letter from the plaintiff to the first defendant dated 30 April 2003 as seen at paras 2 and 3 of p. 26 at exh. "B3" of encl. 12 and it was worded as follows:

> We wish to emphasise that your non-issuance of the power of attorney to us (as stipulated under clause 3.3 of the sale and purchase agreement) has prevented us from obtaining the necessary approvals from the authorities thus leading to a delay on the launch of the project.
>
> As discussed, we stress that we are at all material times ready, able and willing to mobilise our machineries to the site for the propose of construction and launch of the project …

(f) Letter from the plaintiff's previous solicitors, namely, Messrs Edwin Lim & Suren to the defendants' previous solicitors, namely, Messrs Hamzah Sulaiman & Partners dated 12 May 2003 and it was worded like this (see p. 49 of exh. "A5" of encl. 6):

> … We shall be grateful if you will be kind enough to prepare the power of attorney for our approval.

(g) Letter from the plaintiff's previous solicitors, namely, Messrs Edwin Lim & Suren to the defendants' previous solicitors, namely, Messrs Yip Kum Foo & Associates dated 29 May 2003 and it was worded as follows (see para. 3 of p. 50 of exh. "A5" of encl. 6):

> Our clients are however anxious to proceed with and complete the project as soon as possible for mutual benefit. It would be most appreciated if you are able to obtain your client's favourable response …

(h) Letter from the plaintiff to the first defendant dated 27 June 2003 as seen at p. 52, exh. "A5" of encl. 6 and that letter was worded thus:

> We enclosed herewith for your execution a copy of the power of attorney.
>
> Please execute and return to us for stamping and filing with the High Court.

Now, all these letters categorically show that the plaintiff was, at all material times, anxious, ready and willing to proceed to obtain the approvals of the plans connected with the development of the project but was impeded from doing so by the defendants. At this juncture, it is germane to refer to the case of *Chow Yoong Hong v. Tai Chet Siang* [1960] 1 MLJ 130. There, the Privy Council in the context of a sale of a house held that, on the evidence as a whole, the plaintiff there was in fact at all times ready and willing to complete the purchase and accordingly it was held that he was entitled to the recovery

of his deposit. Another case worth referring to would be the case of *Vambadi a/l Vairapperumal v. Sinniah s/o Sellamuthu* [1998] 1 LNS 609, where I allowed the purchaser's application for summary judgment for specific performance against the defendant who breached the sale and purchase of a piece of land by refusing to perform his end of the bargain. In *Yap Mong Siew & Ors v Leong Hum* [1998] 3 CLJ Supp 513, RK Nathan J granted summary judgment for specific performance since the defendant there refused to cooperate with the plaintiffs in obtaining consent from the Ruler-in-Council in regard to the transfer of the land.

The Plaintiff Was Said To Be In Breach Of The Agreement Dated 8 April 1999

This allegation was totally irrelevant to the plaintiff's claim for specific performance of the sale and purchase agreement dated 2 April 1999. It was, to say the least, a red herring to cloud the facts at hand. I must ignore this issue entirely.

Is It Really Just And Equitable For The Relief To Be Granted?

The answer is in the positive. It is certainly just and equitable for the relief to be granted. This court should grant specific performance of the sale and purchase agreement because the plaintiff has expended a substantial amount of money on the land based on the defendants' promise to comply with its obligations under the sale and purchase agreement in particular its obligation to execute a power of attorney in the plaintiff's favour. As alluded to earlier the plaintiff had, *inter alia*, mobilised its plant and started piling and construction work on the land. I have no hesitation to grant summary judgment to be entered for specific performance of the sale and purchase agreement as prayed for in prayers (1) to (3) of encl. 7.

An order for specific performance has the effect of ordering a contracting party to do what he has undertaken to do. It is an equitable remedy. It cannot be asked for as of right. It is a discretionary remedy and the discretion is not to be arbitrarily or capriciously exercised. It is certainly governed by fixed rules and principles (*Lamare v. Dixon* [1873] LR 6 HL 414 at p. 423). Certain factors that may affect the court's discretion have been set out by other judges before me, notable among them would be:

(1) whether there has been a delay in asking for specific performance (*Milward v. Earl of Thanet* [1801] 5 Ves 720);

(2) whether the person seeking specific performance is himself prepared to perform his side of the contract (*Chappell v. Times Newspapers Ltd* [1975] 1 WLR 482);

(3) the court will certainly weigh, on a balance, the difference between the benefit one party will gain from specific performance and the cost of performance to the other party and if the cost is disproportionate to the benefit then this is a factor against the making of an order of specific performance (*Tito v. Waddell (No: 2)* [1977] Ch 106 at p. 326); and

(4) it must be noted that the parties cannot fetter the court's discretion in their contract (*Quadrant Visual Communications Ltd v. Hutchison Telephone UK* [1993] BCLC 442).

In *Lamare v. Dixon (supra)*, a contract had been entered for the lease of some cellars. But before the execution of the contract, the owner promised that he would make them dry. The promise was not a term of the contract and it was not regarded as a misrepresentation since it related to the future. Nevertheless, the owner's failure to make the cellars dry led to the refusal of specific performance.

These authorities serve as useful guidelines in adjudicating enclosure 7

Here, factually speaking, the plaintiff has expended a substantial amount of money on the land based on the defendants' promise to comply with its obligations under the sale and purchase agreement. It is certainly different from the facts in *Lamare v. Dixon (supra)*.

Damages In Addition To Specific Performance

Pursuant to s. 11 of the Specific Relief Act 1950, the plaintiff may also ask for compensation for breach of contract in addition to or in substitution of its performance. Gareth Jones and William Goodhart in their book entitled *"Specific Performance"* stated that one may seek damages in addition to specific performance in order to compensate the loss suffered.

It was submitted on behalf of the plaintiff that the plaintiff should be granted damages in addition to specific performance for the loss suffered due to the first defendant's delay in granting the power of attorney to the plaintiff. I readily subscribe to these salient submissions.

In *Rainbow Estates Ltd v. Tokenhold Ltd* [1998] 2 All ER 860 it was held that specific performance "should be available when damages are not an adequate remedy or, in the more modern formulation, when specific performance is the appropriate remedy" (see p. 868 of the report). But the question of whether damages will be an adequate remedy for a breach of contract is often put in terms of whether the injured party would be able to purchase a substitute performance if given the remedy of damages. Thus, a contract for the sale of shares which are freely available on the market will

not be specifically enforced. The injured party would be able to secure a substitute by buying other shares in the market (*Cud v. Rutter* [1720] I P Wms 570). But in a situation where the replacement shares will not be readily available then specific performance might be ordered. A classic example would be the case of *Harvela Investments Ltd v. Royal Trust Co of Canada* [1985] 2 All ER 966 where the contract relates to shares that determine the controlling interest in a company. In sharp contrast would be the case pertaining to a transaction involving a piece of land. The courts seem to assume that any piece of land, no matter what it is wanted for, is always unique and that damages will always be an inadequate remedy. In the context of adjudicating encl. 7, as I said in the early part of this judgment, everything revolved on the land in question.

Damages In Lieu Of Specific Performance

In the alternative, the plaintiff prays for damages *in lieu* of specific performance against the first defendant. In this connection, reference to clause 9 of the sale and purchase agreement should be made. That clause stipulates that in the event of default the purchaser (referring to the plaintiff) may *in lieu* of specific performance elect to sue for damages for breach of contract from the vendor (referring to the first defendant).

Prayer (8) Of encl. 7

It cannot be denied that the first defendant was and is aware, at all material times, that construction works would be delayed and that the plaintiff would suffer loss and damages if the power of attorney is not granted. In this connection, there was certainly ample documentary evidence which was alluded to somewhere in this judgment. Consequently, it is just and proper that the first defendant indemnifies the plaintiff on any claims/demands which the second defendant may bring against the plaintiff under the agreement dated 8 April 1999 entered between the plaintiff and the second defendant.

Prayer (9) Of encl. 7

It must be borne in mind that the second defendant had expressly admitted that it agreed to carry out the duties of the first defendant (see the letter dated 7 May 2003 written by the second defendant to the plaintiff). Unfortunately, till to date, the second defendant has failed, refused and/or neglected to procure the power of attorney for the plaintiff.

It was the stand of the plaintiff that the second defendant has acted in bad faith when it refused to procure the power of attorney for the plaintiff thereby causing delay to the development works. It is unconscionable for the second defendant to insist that the plaintiff should strictly comply with the time frame for the development works as set out in the agreement dated 8 April 1999

entered between the plaintiff and the second defendant. In the circumstances, it would be just and proper for this court to grant a declaration that the plaintiff is not liable to the second defendant for any loss or damage in relation to the agreement dated 8 April 1999 entered between the plaintiff and the second defendant as prayed for in prayer (9) of encl. 7.

Why Must Specific Performance Be Decreed In This Case?

It is to do justice. It is according to Lord Selborne in *Wilson v. Northampton and Banbury Junction Rly Co* [1874] 9 Ch App 279 at 284, that:

> The court gives specific performance instead of damages, only when it can by that means do more perfect and complete justice.

And according to Lord Parker in *Stickney v. Keeble* [1915] AC 386 at 419:

> Indeed, the dominant principle has always been that equity will only grant specific performance if, under all the circumstances, it is just and equitable so to do.

Section 18 of the Specific Relief Act 1950 is of great utility. It enacts as follows:

Power to award compensation in certain cases.

18. (1) Any person suing for the specific performance of a contract may also ask for compensation for its breach either in addition to, or in substitution for, its performance.

(2) If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

ILLUSTRATION

A contracts to sell a hundred gantangs of rice to B. B brings a suit to compel A to perform the contract or to pay compensation. The court is of opinion that A has made a valid contract and has broken it, without excuse, to the injury of B, but that specific performance is not the proper remedy. It shall award to B such compensation as it deems just.

(3) If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

ILLUSTRATION

A contracts with B to sell him a house for RM 1,000, the price to be paid and the possession given on the 1st January. A fails to perform his part of the contract, and B brings his suit for specific performance and compensation, which is decided in his favour. The decree may besides ordering specific performance, award to B compensation for any loss which he has sustained by A's refusal.

(4) Compensation awarded under this section may be assessed in such a manner as the court may direct.

(5) The circumstance that the contract has become incapable of specific performance shall not preclude the court from exercising the jurisdiction conferred by this section.

ILLUSTRATIONS

(a) A, a purchaser, sues B, his vendor, for specific performance of a contract for the sale of a patent. Before the hearing of the suit the patent expires. The court may award A compensation for the non-performance of the contract, and may, if necessary, amend the plaint for that purpose.

(b) A sues for the specific performance of a resolution passed by the directors of a public company, under which he was entitled to have a certain number of shares allotted to him, and for compensation for the non-performance of the resolution. All the shares had been allotted before the institution of the suit. The court may, under this section, award A compensation for the non-performance.

And I must give effect to s. 18 of the Specific Relief Act 1950. According to *Lee Hoy v. Chen Chi* [1971] 1 MLJ 76, the court may not award compensation under s. 18 of the Specific Relief Act 1950 if the plaintiff did not ask for specific performance in the first place. Indeed, s. 18 of the Specific Relief Act 1950 is important. It concerns the award of damages either in addition to, or in substitution for, specific performance. According to Edgar Joseph Jr FCJ in *Tan Sri Khoo Teck Puat v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15 that:

> Section 18 of the Specific Relief Act 1950 … is based on section 19 of the Indian Specific Relief Act 1877, which in turn, has its roots is section 2 of the Lord Cairns' Act and *Jacques v. Millar* [1877] 6 Ch D 153.

Then there is s. 19 of the Specific Relief Act 1950 which states that a contract which is otherwise specifically enforceable may be enforced notwithstanding the fact that there is contained within the contract a liquidated damages clause (*Nik Mohamed Salleh v. Tengku Besar Zabidah* [1971] MLJ 73 at 76; *Zaibun Sa bte Syed Ahmad v. Loh Koon Moy* [1982] CLJ 457; [1982] CLJ (Rep) 58, [1982] 4 PCC 49 at 54; *M Ratnavale v. S. Lourdenadin* [1988] 2 MLJ 371, [1988] 2 SCR 161 at 175; *Lim Sin Oo v. Cheah Tjeng Siong* [1989] 1 CLJ 953; [1989] 2 CLJ (Rep) 68; *Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd (supra),* [1989] 1 SCR 385 at 391; and *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah* [1995] 1 CLJ 293).

I too took into account the case of *Narayanan Chettiar s/o Raman Chettiar v. Samuel Jivamoney Dass s/o Chelliah* [1986] 1 CLJ 579; [1986] CLJ (rep) 547 which held that where an order for specific performance would breach the principles of natural justice then damages would be the more appropriate remedy.

All said and done, in adjudicating encl. 7, I have vigorously applied all these principles. They certainly serve as useful guidelines.

Conclusion

For the reasons as adumbrated above, I gave an order in terms of encl. 7.